

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

2004 AUG 25 P 3:11
DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

JAIME DEMILLE,

Plaintiff,

vs.

**CONVERGYS CORPORATION
DISABILITY PLAN, and CONVERGYS
CORPORATION,**

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:03CV265DAK

This matter is before the court on Plaintiff Jaime Demille's Motion for Summary Judgment and Defendants Convergys Corporation Disability Plan and Convergys Corporation's Motion for Summary Judgment. The court held a hearing on these motions on August 10, 2004. Plaintiff was represented by Marcie E. Schaap, and Defendants were represented by Gary A. Dodge. The court took the motions under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to the parties' motions. Now being fully advised, the court enters the following Memorandum Decision and Order.

BACKGROUND

Plaintiff appeals an ERISA Plan Administrator's denial of her request for short-term disability leave from her employer, Convergys Corporation. Demille works as a Sales Operation

Team Leader in Convergys' customer call center in Cedar City, Utah. Demille is covered by the terms of a self-insured short-term disability plan established by Convergys ("the Plan").

Convergys retained UNUM as the claims administrator of the Plan. In 2001, at the time Plaintiff requested short-term disability leave, the Plan's Summary Plan Description ("SPD") provided that "UNUM America has complete discretionary control and authority to consider and determine benefit claims and appeals of benefit claims." However, there is a dispute between the parties as to whether the court should consider the language in the 2001 SPD. Plaintiff claims that she was not given an updated copy of the SPD until Defendants filed their motion for summary judgment in this litigation. Defendants, however, contend that the 2001 SPD was available to all participants through their local human resources director and on-line.

On December 12, 2001, Plaintiff submitted a claim for short-term disability under the Plan claiming that she was unable to work because she alleged that she had chronic fatigue syndrome. The term "disabled" is defined under the Plan to mean that "because of illness or injury you cannot perform each of the material duties of your occupation."

UNUM denied Plaintiff's claim and upheld that denial after her administrative appeal. UNUM concluded that Plaintiff had not demonstrated that she met the criteria for chronic fatigue syndrome. UNUM relied on several tests, including the "Holmes" test which has been widely adopted, for diagnosing chronic fatigue syndrome. These tests require that two or more of the following three physical criteria must be documented by a physician on at least two occasions, at least one month apart: (1) low grade fever; (2) nonexudative pharyngitis; and (3) palpable or tender anterior or posterior cervical or axillary lymph nodes. This "physical criteria" must be submitted in addition to the patient's subjective description of symptoms in order to meet the

criteria for chronic fatigue syndrome.

Although Plaintiff saw several doctors several times and complained of the subjective symptoms of chronic fatigue syndrome, UNUM concluded that she had not produced sufficient evidence of the physical criteria documented by a physician. UNUM did not rely on self-reported symptoms. There is one documentation by one of her doctors stating "bacterial pharyngitis." There is one notation that Demille had a history of fever and sweat. And, there is a notation of groin lymph node swelling and pains.

UNUM also concluded that Plaintiff had also failed to submit sufficient evidence demonstrating that her symptoms were sufficiently severe to preclude the functional capacity needed to perform the material duties of her positions at Convergys as Sales Operations Team Leader. UNUM relied on the Convergys job description to determine that the position best matched the material duties reported in the Dictionary of Occupational Titles ("DOT") for "Manager, Sales." UNUM found that the occupational demands for Manager, Sales were sedentary—requiring "significant sitting; occasional exertion up to 10 lbs.; occasional reaching; and frequent handling and fingering." Plaintiff's doctor, Dr. Robert Corry, provided work limitations for Plaintiff that she should not be on her feet more than two hours per day and that she should not sit at a desk for more than six hours per day. Because UNUM concluded that Plaintiff's job was sedentary, they found that the limitations suggested by the doctor supported Plaintiff's ability to work full time in her position.

After UNUM upheld its decision on administrative appeal, Plaintiff brought this appeal in district court.

DISCUSSION

Plaintiff argues that Defendants wrongfully denied her claim for short-term disability. In contrast, Defendants argue that the Plan Administrator's decision denying benefits should be upheld. Both parties filed motions for summary judgment. The parties dispute the appropriate standard of review that should be applied to the Administrator's decision. The parties also each assert that under either the de novo or arbitrary and capricious standard of review that they are entitled to judgment as a matter of law.

I. Standard of Review

The first issue for this court to determine is the appropriate standard of review to apply to UNUM's decision denying benefits. The parties dispute whether the case should be reviewed under a de novo standard or arbitrary and capricious standard. The United States Supreme Court has held that a denial of benefits challenged under ERISA, "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). When the plan grants discretionary authority to the administrator, the denial of benefits is reviewed under the "arbitrary and capricious" standard. *Chambers v. Family Health Corp.*, 100 F.3d 818, 825 (10th Cir. 1996).

The 2001 SPD in place at the time of Plaintiff's claim stated that "claims for disability benefits are administered by UNUM America. UNUM America has complete discretionary control and authority to consider and determine benefit claims and appeals of benefit claims." Although this language clearly gives the administrator discretion, the dispute between the parties focuses on whether that language should be considered by the court because Plaintiff claims that

she did not receive a copy of the 2001 version of the SPD.

Plaintiff admits that the 2001 SPD provides discretion. However, she argues that because this version of the Plan was not produced to Plaintiff at any time prior to litigation or in Defendants' Rule 26(a)(1) Initial Disclosures, the Defendants may not rely on it now. Plaintiff argues that the Defendants should be bound by the earlier SPD that does not contain discretionary language because she has relied on this document.

Defendants provided evidence that the SPD was available to plan participants. Defendants also contend that UNUM drafted the 2001 SPD and had it when it decided Plaintiff's case at the administrative level. Plaintiff argues that in an ERISA action, all parties are limited to the evidence in the administrative record. *See Chambers*, 100 F.3d at 818. However, if UNUM used the standard in the 2001 SPD, the SPD would be a part of the administrative record. Furthermore, Plaintiff does not appear to dispute that the 2001 SPD was available through the human resource director or on-line. Therefore, it appears that Defendants fulfilled their requirements under ERISA for distribution of the plan documents. Although Plaintiff argues that she was not aware of the new version, this court finds that her subjective lack of knowledge with respect to the governing SPD does not present a situation that would require the court to exclude the SPD from consideration. UNUM was aware that it had discretion to make determinations under the Plan. This is the evidence that was before the Plan Administrator when it made its determination in this case and the court's review is limited to that evidence.

Furthermore, Plaintiff relies on Rule 37(c)(1) of the Federal Rules of Civil Procedure to argue that a party should not be allowed to use evidence not previously disclosed. Defendant responds that Plaintiff has not shown or been prejudiced by its failure to disclose the 2001 SPD

in its Initial Disclosures. Plaintiff's only basis for demonstrating prejudice was her counsel's comment at oral argument that she may not have taken the case if she had known that the SPD granted the Administrator discretion. The court finds that this is not the type of legal prejudice Rule 37 contemplates. Therefore, the court concludes that the appropriate standard of review to apply in this case is arbitrary and capricious because the SPD in effect at the time of the Administrator's decision granted the Administrator discretion.

II. Determination of Disability

UNUM denied disability leave based on two reasons: (1) Plaintiff did not adequately demonstrate that she met the criteria for chronic fatigue syndrome; and (2) Plaintiff did not demonstrate that she could not complete one of the duties of her position based upon her illness.

Under the arbitrary and capricious standard, UNUM's decision regarding Demille's claim must be upheld on review as long as UNUM considered relevant factors in its analysis and can offer a reasoned explanation for the denial of benefits based on the evidence and plan documents. In *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999), the court recognized that "the Administrator's decision need not be the only logical one nor even the best one. . . . The decision will be upheld unless it is not grounded on any reasonable basis." *Id.* at 1098. The district court "need only assure that the administrator's decision falls somewhere on a continuum of reasonableness—even if on the low end." *Id.*

A. Chronic Fatigue Syndrome

UNUM relied on several tests, including the "Holmes" test which has been adopted by the United States Department of Health and Human Services Centers for Disease Control and Prevention, for diagnosing chronic fatigue syndrome. These tests require that two or more of the

following three physical criteria must be documented by a physician on at least two occasions, at least one month apart: (1) low grade fever; (2) nonexudative pharyngitis; and (3) palpable or tender anterior or posterior cervical or axillary lymph nodes. This "physical criteria" must be submitted in addition to the patient's subjective description of symptoms in order to meet the criteria for chronic fatigue syndrome under these tests.

Plaintiff argues that she provided medical records and reports from her treating physicians that demonstrate she has chronic fatigue syndrome but that Defendants did not give the proper weight to her treating physicians' opinions, did not properly investigate the claim, and did not have their own physician examine her. Defendants argue that after a review of all the medical evidence submitted by Demille, UNUM found that Demille had not produced adequate medical evidence of a physical exam demonstrating pharyngitis, lymphadenopathy, or fever on at least two occasions. Defendants refused to rely on any symptoms in the medical records that were self-reported and not confirmed by the doctors. Because Demille did not present medical evidence of confirmed physical criteria on at least two occasions, Defendants contend that the decision to deny her claim was based on a reasoned explanation and survives any possible challenge under an arbitrary and capricious standard.

Plaintiff argues that the medical records show evidence of a diagnosis from Dr. Corry on December 18, 2001, of "bacterial pharyngitis," a notation on October 4, 2001, that she has a history of fever and sweat, and a January 17, 2002, notation by Dr. Alfaro that Demille had neck pain and groin lymph node swelling and pains. Plaintiff argues that these medical records in addition to Demille's self-reported symptoms that fit the requirements for CFS is enough. However, Defendants assert that these notations are not supported by test results or lab

documentation. In addition, the notation of her history of fever and sweats was a self-reported symptom that did not need to be considered. Moreover, Defendants point to a notation by one of Plaintiff's doctor that states they needed to do a thorough investigation of the problem. Defendants assert that this is consistent with the proper diagnosis for CFS which requires other things to be ruled out.

Under the arbitrary and capricious standard of review, the court cannot conclude that the Administrator's decision had no reasonable basis. It was within UNUM's discretion to employ the criteria tests it used and the medical records did not support a finding of CFS under those criteria. Although there were some symptoms reported to indicate CFS, there was adequate evidence in the medical records to suggest that an actual diagnosis of CFS had not been made, a further investigation was necessary, and the physical criteria had not be sufficiently confirmed or documented.

Plaintiff asserts that by requiring her to meet the physical criteria of the Holmes test UNUM imposed requirements on her that were never a part of the Plan. In addition, Plaintiff argues that the SPD does not require objective medical evidence in order for a participant to be eligible for benefits. The SPD states only that "If your doctor cannot substantiate your disability by objective findings, you may be required to see a doctor selected by the claims administrator for an independent evaluation." However, the Plan clearly places the burden on the plan participant to demonstrate that he or she meets the standard. In addition, it was within UNUM's discretion as to whether an independent examination was necessary. The court does not conclude that UNUM acted without a reasonable basis in denying Plaintiff's claim. Therefore, the court upholds the decision denying benefits.

B. Material Duties of Position

UNUM relied on the official Convergys job description to find the position that most closely matched the material duties reported in the Dictionary of Occupational Titles ("DOT"). UNUM found that the occupational demands for "Manager, Sales" best matched her job description and that the duties were sedentary—requiring "significant sitting; occasional exertion up to 10 lbs.; occasional reaching; and frequent handling and fingering." Plaintiff's doctor, Dr. Robert Corry, provided work limitations for Plaintiff that she should not be on her feet more than two hours per day and that she should not sit at a desk for more than six hours per day. Because UNUM found that these limitations were consistent with the sedentary job description, it found that Plaintiff could perform the duties of her position.

Plaintiff contends that one of her supervisors wrote on the bottom of her job description that her job involved spending 80% of her time on her feet managing the representatives under her supervision. Because she could not be on her feet more than 2 hours a day, Plaintiff argues that she could not perform one of the material duties of her job.

Defendants argue that Demille must be unable to perform one of the material duties of her job because of illness or injury and she has not demonstrated that she has an illness. Also, Defendants dispute that the handwritten portion of her job description cannot contradict the employers official job description and is not based on any competent evidence. However, at oral argument, Defendants' counsel conceded that there is possibly a fact question as to the sedentary nature of Plaintiff's position.

Because the court upholds the Plan Administrator's decision finding no illness, it need not determine whether Plaintiff could not fulfill the material duties of her position as a result of

an illness. Therefore, the Plan Administrator's decision is upheld.

CONCLUSION

Based on the above reasoning, Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Motion for Summary Judgment is DENIED. This case is dismissed with prejudice, each party to bear its and her own costs.

DATED this 24th day of August, 2004.

BY THE COURT


DALE A. KIMBALL
United States District Judge

United States District Court
for the
District of Utah
August 26, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00265

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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